No. 11749

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. A. JOSE, OLGA JOSE, CORDA LANCASTER, WILLIAM LANCASTER, ELLA JACKMAN, JOHN I. JACKMAN, GEORGE T. RENAKER, JOHN S. PATTEN, HARRIS H. HAMMOND, A. L. BERGERE, J. C. BERGERE, WILLARD WALLACE, EDNA M. WALLACE, JAMES P. DELANEY, MARY J. DELANEY and IRVIN S. BARTHEL,

Appellants,

vs.

HATTIE M. HOUCK, as Administrator of the Estate of Stanley B. Houck, Deceased, RUBY E. EDLING, WILNA N. SHERARD, HATTIE M. HOUCK, RUTH M. HEBBARD, MINNIE N. McKENZIE, HOWARD H. McKENZIE, VERONICA K. GHOSTLEY and H. W. LEWIS,

Appellees.

BRIEF OF APPELLEES.

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BRIEF OF APPELLEES.

Introduction.

Through error, in the printing of the transcript or otherwise, two of the appellees' names were misspelled, and we hereby request that the record be corrected to show the name of Wilna N. Sherard in place of Wilna M. Shepard, and Ruth M. Hebbard in place of Ruth M. Hebberd. We would also like to point out that while H. W. Lewis appears as an appellee herein, he is not one of the original locators and appears in this proceeding as attorney-in-fact for the other appellees [R. 75-80].

Wherever in this brief any authority is quoted in italics, such emphasis has been supplied by appellees, unless otherwise indicated.

There are three sets of claimants involved in the case at bar, one group being the appellees (hereinafter, in the interest of brevity, called the Houck group), appellants Harris H. Hammond, *et al.* (hereinafter, in the interest of brevity, called the Hammond group), and appellants J. A. Jose, *et al.* (hereinafter, in the interest of brevity, called the Jose group).

This brief shall be in response to both briefs filed by each group of appellants herein.

Statement of Pleadings and Facts Disclosing Jurisdiction.

(1) The statutory provisions sustaining the jurisdiction of the District Court of the United States are found in Judicial Code of the United States, Section 24, as amended (28 U. S. C. A. (41)). Jurisdiction of this Court is based upon Judicial Code, Section 128, amended (28 U. S. C. A. (225)); Judicial Code, section 238 (28 U. S. C. A. (345)).

(2) The Complaint alleges that jurisdiction is founded on diversity of citizenship, the existence of a Federal question, and the amount in controversy. These allegations were admitted by the appellants and stipulated to in the trial. The summary of the pleadings by appellants Hammond, *et al.,* is substantially correct.

Statement of the Case.

The land involved herein contains deposits of montmorillonite clay, which has value as a food supplement for poultry, cattle and agricultural products [R. 137].

On October 22, 1920, the lands involved herein were, by order of the Secretary of the Interior, withdrawn from entry [R. 236] and by Executive Order dated August 21, 1941, were withdrawn by the War Department to be used for combat firing ranges and maneuvering purposes [R. 237]. From the period beginning October 19, 1920, to July 6, 1945, the land involved herein was not open for entry or for the filing of any mining claims [R. 237]. The lands were reopened for entry pursuant to order of the Secretary of the Interior dated July 6, 1945, to be effective on the 63rd day from that date, pursuant to an application made therefor by appellees herein [R. 238-239].

No issue of discovery was tendered at the trial of this matter by the pleadings, evidence or argument. (See paragraph VI of Complaint [R. 4] and paragraph III of defendants' Answer thereto [R. 10]. Also, see Stipulation at beginning of the trial [R. 63].) In view of the fact that this seems to be the principal point of appellants Hammond, *et al.*—that there was no evidence of the discovery of mineral by appellees—we consider the failure to raise such issue at the trial to be of prime importance.

If there is any question in this case of discovery (which, it is the view of appellees, there is not), the fact that appellees herein applied to the Land Department for opening of the land for mineral entry presents strong evidence of such discovery. It is made even more compelling by the action taken upon the application of appellees by the

Department of the Interior, in reopening the lands for mining entry, as requested by appellees, as aforesaid.

Mr. Harold W. Lewis, attorney-in-fact for appellees herein, went upon the property the first time in 1942. He was on the property many times after that and before the locations were filed [R. 84]. While he was on the property, he picked up some samples of the land, brought them in and had them analyzed by Smith-Emory. According to that analysis, the material contained the montmorillonite clay "that we have referred to in the Stipulation on the property" [R. 143]. This, it is to be observed, is the same montmorillonite clay referred to in the request to the Land Department by Stanley B. Houck, *et al.,* to reopen the lands for mining entry [R. 241].

According to the order of the Secretary of the Interior reopening the land for entry for mining locations, the first entry was permitted sixty-three days after July 6, 1945, at 10:00 a. m. [R. 240]. Appellees were not certain whether the sixty-third day fell on the 6th or the 7th of September, 1945. Out of an abundance of precaution, appellees filed Notices of Location on both days [R. 406]. When Harold W. Lewis (as attorney-in-fact for appellees herein) and Stanley B. Houck went upon the property on September 6, 1945, with the surveyors, they had with them for each of the locations involved herein a board about four inches wide and about four feet long, on each of which they had painted with black paint the name of the claim, and the legal description thereof, and they also took with them pint Mason jars to be placed in holes at the base

thereof. They first went to Tropical No. 2, drove one of the posts with the name and legal description of the property painted thereon into the ground, dug a hole at the base thereof about five inches deep and placed one of the Mason jars therein, and put the duplicate of the mining location [Appellees' Exhibit 6] inside the Mason jar, after dating it, timing it and witnessing it, and put the cap back on the jar [R. 118, 119]. They went through the same procedure with all the other claims [R. 121-126]. On September 7th, 1945, they again went upon the property, observed that the posts driven into the ground the day previous and the Mason jars at the foot thereof, were still there, filed new claims, witnessed the signatures, placed the time on each notice, and placed them in the Mason jars that were already on the property. [R. 126]. This was done on every claim [R. 126-132, 218].

Thereafter, Mr. Lewis went upon the property on several occasions, checked to see that every Notice of Location was in the jar, and found that they were [R. 133-134]. Right after Thanksgiving, 1945, appellees took by truck some forty men from Brawley in transportation furnished by appellees to commence the development work required by Sections 2304(b) and 2305 of the Public Resources Code of the State of California [R. 135, 136]. This work was done by pick and shovel [R. 136]. The day labor was paid for on the basis of $1.00 per hour [R. 138]. This was a very low rate for labor to go into the desert [R. 156]. By this type of labor, appellees removed from the sixteen mining claims involved herein, the

total of 1,436.10 cubic yards of material [R. 69-74]. In removing this material from the open cuts upon each claim, appellees moved more than the seven cubic yards of material required by Section 2305(b) of the Public Resources Code of California, and performed more than one dollar's worth of work for each acre included in the claim, as required by Section 2305 of that Code [R. 138-142], expending in connection with this development work a little over $2,600.00, the required amount being, at $1.00, $2,560.00 [R. 142]. The money was expended for actual mining development work exclusive of cabins, buildings or other structures [R. 142]. The money was paid to the Bank of America at Brawley by cashier's check in the amount of $2,500.00, and the laborers were paid in the bank in the presence of officers thereof [R. 176-179, 180-182].

The Hammond group went upon the property on September 6th, 1945, with their engineer, to ascertain the locations of the government monuments or stakes designating the section corners [R. 267-269]. On September 7th, 1945, the Hammond group again came upon the property with claims prepared in Colorado, and upon Colorado forms [R. 348], not containing a statement of the markings and boundaries of the property, as required by Section 2303 of the Public Resources Code of California [R. 348-349], which location notices had been tacked upon stakes, which stakes they drove into the ground or around the base of which they erected monuments to hold them in place [R. 258, 271-306]. The appellants did not place

any receptacle in the ground below said notices nor did they take any steps to prevent their Notices of Location from blowing away or being destroyed or obliterated by the elements, the evidence being that there is considerable wind in this area, the wind having partially filled with sand some of the excavations made in the performance of the discovery work [R. 380, 383]. Even upon the purported Notice of Location, which the appellants succeeded in discovering as still upon the property in December of 1946 [R. 253], and which they brought into Court, there was no evidence that the same had ever been signed, although the defendants contended that it had been signed and the signatures erased by the weather [R. 254, 380]. The forms used by the said appellants did not conform to the statute which requires that there must be a statement of the markings and boundaries of the claim [R. 348]. The originals of these documents were recorded at 10:00 a. m. on the 7th of September, 1945, and contained not only no statement of markings and boundaries, but also, of course, no statement of the discovery work thereon [R. 348-349]. They were not offered in evidence to show that the appellants complied with any statute, but only to show that appellants had in evidence a duplicate of that which was posted on the property [R. 349]. The Amended Notices of Location were offered in evidence and received over appellees' objection, that intervening claims had been filed between the time of the original location notice (which appellants Hammond, *et al.,* admit were invalid) and the time of the filing of the amended claim [R. 352].

The defendants Jose, *et al.*, in filing their claims, simply made excavations in the ground and buried their notices in tin cans on the property on January 17, 1946, recording duplicates thereof on the same day [R. 308-318].

As to discovery work, the appellants Hammond, *et al.*, in November of 1945, caused a mining engineer to come upon the property and locate the area where exploratory work on each claim was to be done, and caused a D-8 bulldozer, a Carryall, and incidental oiling and repairing equipment, to come upon the property and excavate quantities of earth therefrom [R. 324-333]. He stated that a man with a bulldozer could remove the quantity of material to which he testified for fifty cents per cubic yard, whereas, doing the same work by hand labor, would run close to $3.00 per cubic yard [R. 345-346]. There was no evidence presented at all by appellants Hammond as to the amount actually expended by them in performing the said work, nor was any evidence presented as to what, if any, money was expended, and how, or under what circumstances.

A witness for the Jose group testified that moving dirt with a bulldozer and carryall in the Imperial Valley could be done for thirty cents per cubic yard [R. 397].

As to the development work by the appellants Jose, *et al.*, they paid out $1,367.00 for the development work they performed [R. 321], approximately $700.00 of which was paid to Mr. Jose, one of the appellants [R. 321], the remainder being paid for operating the bulldozer [R. 321-322].

ARGUMENT.

Introduction.

We shall discuss the brief of the Hammond group first and then the brief of the Jose group. First of all, we desire to discuss the proposition made by appellants Hammond, *et al.,* in their argument.

Point I of Appellants Hammond, et al.

In general, we have no argument with appellants' first proposition, that in a suit to quiet title, the plaintiff must establish his own title and cannot recover upon the weakness of the defendant's title. This rule, however, we think is somewhat modified on the question of discovery of mineral prior to location in actions to quiet title to mining claims, as was said in the case of *Chrisman v. Miller,* 197 U. S. 313, 323 (25 S. Ct. 468) (a case that arose in California, and is cited by appellants):

> "It is true that when the controversy is between two mineral claimants, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority. . . ."

With this qualification of appellants' first contention, we take no issue with them thereon. We think it is not untimely at this point, however, to call attention to appellants' haste in referring to the weaknesses of their own title at the very outset of their argument, and protesting

appellees' right to recover thereon. We shall show that appellees did not recover upon such weaknesses, were fully entitled to recover upon good and mining-like locations, discovery work and proper filings, and that appellants all fall far short of such compliance.

Point II of Appellants Hammond, et al.

In the second point of appellants Hammond, *et al.*, the argument is presented that a claimant must establish a discovery by him of minerals. We have already called attention to the case of *Chrisman v. Miller, supra,* and have pointed out some of the weaknesses in the appellants' position. We shall likewise show that appellants Hammond are confused between discovery of minerals *before* location, and *discovery work after* location.

So far as we were able to ascertain, all well-known authors upon the subject of mining law point out the distinction between the two. In Costigan's Mining Law, page 154, Sec. 43, is found the following:

> "The discovery must be distinguished from the discovery shaft required by state statutes as part of the location. The discovery shaft is one of the acts of location which normally follows location."

The same distinction is set forth in Vol. 2, Lindley on Mines, page 806, Sec. 345.

Ricketts, American Mining Law, Sec. 602, footnote number 37, calls attention to the same distinction.

Appellants are confused as to the correct definition of "discovery." Before there can be a location notice, there must be a discovery of minerals. This is not the kind of discovery that was being disussed in the case of *U. S. v. McCutcheon,* 238 Fed. 575, relied upon by appellants

Hammond et al., that being an oil and gas case, and involving the discovery work *after* location. Appellants Hammond omit from the portion of the opinion quoted in their brief (p. 19) the following, which illustrates the point:

> "This discovery, in its broad and comprehensive sense, is the doing or the accomplishing of that thing, with respect to the land sought to be appropriated, which serves to impress upon it the quality of being land which is open to appropriation or exploration, in the manner and pursuant to the law, sought to be made use of. And it may be said that, with becoming propriety, both judicial and departmental rulings have evinced a disposition to be liberal toward locators in the matter of the requirement as to what will suffice to constitute such a 'discovery' as to segregate the land sought to be selected from the public domain and invest it with the attribute of mineral land, and subject to private ownership or exploration, what discovery, then, will suffice to meet the requirements under the Act of 1897? Though under that act, entry and patent were to be obtained pursuant to the placer mineral laws, yet it must be remembered that upon location and 'discovery,' followed or accompanied by the expenditure of $500.00, and upon application, patent from the government was to follow. R. S. §2325. (Comp. St. 1913 §4622)."

Appellants refer to the case of *Steele v. Tanana Mines Company,* 148 Fed. 678, 679 (C. C. A. 9) (agricultural lands), but fail to call attention to the language at page 680 thereof applicable here, as follows:

> ". . . When the controversy is between two mineral claimants, the rule respecting the sufficiency

> of a discovery of minerals is more liberal than when it is between a mining claimant and one seeking to make an agricultural or other entry under the land laws. The reason for this distinction is said to be that, when land is sought to be taken out of the category of argicultural land, the evidence of its mineral character should be reasonably clear, while in respect to a controversy between rival claimants to mineral land, the question is simply which is entitled to priority."

The case of *Hall v. McKinnon,* 193 Fed. 572, 576, which appellants Hammond, *et al.* state is to the same effect as the *Tanana Mines* case, involves discovery work after the filing of the Notice of Location. (Staked by eight locators claiming 160 acres.) "Gold was discovered on this claim in August, 1905, in a shaft sunk to a depth of about 88 feet on or near the western boundary line as claimed by the defendants. This discovery was sufficient to support the location of an entire tract of 160 acres."

Appellants Hammond state that the California case of *Toulemne Consolidated Mining Company v. Maier,* 134 Cal. 583, 585 (66 Pac. 863), is to the same effect. Insofar as they see fit to quote the *Toulemne* case, that is correct. But that case involved a controversy between an owner of an easement over the mining land for a water ditch and a locator of the mining land. The court specifically there held (immediately following the portion cited by appellants):

> "And, for the purposes of this case, it is unnecessary to decide whether such discovery must precede the posting and filing of the notices; for it may be here conceded that a previous location may be made

valid by a subsequent discovery of mineral; still there can be no valid claim to the land, and it must be treated as government land up to the time of such discovery. . . ."

Even at the expense of repetition, we wish to emphasize appellants' failure to distinguish between the cases involving conflicting locators' claims and conflicts between locators of mining claims and those of surface rights.

Appellants Hammond give a definition of discovery on pages 20-21 of their brief, and cite 40 Corpus Juris, Mining and Minerals, Sec. 177, as authority therefor. The entire paragraph referred to, and with which we have no quarrel, is as follows:

> *"What Constitutes Discovery.* The mining statutes do not prescribe what is necessary to constitute a discovery, and no arbitrary rule as to what will constitute a sufficient discovery can be stated which will govern all cases, either in respect of lode claims or placer claims, *whether a discovery has been made being generally a question of fact for a jury to determine.* It may be stated generally, however, that the term 'discovery' as applied to a mining claim means the acquirement of knowledge that a vein or lode exists within the limits of the claim, or in case of a placer claim that it is reasonably valuable for such mining. And while it is not necessary that ore or mineral in paying quantities be found, it is well settled that mineral must be found under such circumstances and of such a character and quantity that a reasonably prudent man, not necessarily a skilled miner, would be justified in expending time and money developing it, with the reasonable expectation of finding mineral in paying quantities; mere indications of minerals are not sufficient."

Cameron v. United States, 252 U. S. 450, 40 S. Ct. 410, cited by appellants Hammond as authority for the portion of the above reference that said appellants desire this Court to have, is cited by Corpus Juris as authority for the same.

While we herein have gone and are going to some extent to point out the failure of appellants Hammond to present the full authorities to parts of which they refer, we do not want this Court to lose sight of the proposition that in this action, being between rival mineral locators, no issue of discovery is involved.

In the same work (Corpus Juris, Mines and Minerals, Sec. 183), a discussion of what is meant by "discovery work," with which appellants seem to have confused discovery of minerals, is set forth. We feel certain we need not develop the distinction for the benefit of this Court.

Appellants Hammond state that the definition of discovery, as set forth by them, has been adopted by the District Court of Appeal of California in the case of *Kramer v. Gladding, McBean & Co.,* 30 Cal. App. (2d) 98, 104, 85 P. (2d) 552. That case is authority for the proposition that a locator does not have to *personally* discover minerals on the land; that if he knows that a prior locator has discovered minerals thereon, it is sufficient. (See also to same effect, Lindley on Mines, Vol. 2, p. 763.) The case also holds that when the locator (of a lode claim) finds rock in place containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. "It is the finding of the mineral in the rock in place, as distinguished from flat rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim." (Quoting from

Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 677.)

On page 22 of appellants Hammond's brief, they quote from the case of *Garibaldi v. Grillo,* 17 Cal. App. 540 (120 Pac. 425), as holding that where a locator prior to location took out two pans of dirt from the land which he was told by other parties contained gold in paying quantities, the trial court was justified in holding that there had been no discovery. Only one quotation from that case, wherein the Court there quotes from the appellant's brief filed therein, is necessary to dispose of any relevancy of that case to the facts of the case at bar:

> "Plaintiffs say in their brief: 'It is not claimed that, prior to making the location under consideration, plaintiffs actually discovered gold in paying quantities upon the claim located. . . .'"

Appellants Hammond make reference (p. 22) to the case of *Chrisman v. Miller, supra,* as holding that it is not enough that there may have been some indications by outcroppings on the surface of existence of lodes or veins of rock in place bearing gold, etc., to justify their designation as "known" veins or lodes. In that case, the California trial court, having found that there was no discovery, and that finding having been sustained by the Supreme Court of California (140 Cal. 440), the holding was that the findings of fact of the State Courts were conclusive upon the United States Supreme Court.

As to sufficiency of discovery, in addition to the Stipulation which was entered into at the beginning of the trial to the effect that the value of the mineral deposits on the land is greatly in excess of the jurisdiction of the Court [R. 63], Mr. Harold W. Lewis, attorney-in-fact

for appellees, herein testified that he was first upon the land in 1942 and that he took samples therefrom and had them analyzed and found that they contained Montmorillonite clay [R. 143]. The witness for the appellants, William E. Wilson, a mining engineer, testified that the clay ran through the entire area, a narrow area of about 40 square miles [R. 341]. In addition to all this, appellees herein filed with the Land Department a letter requesting that the land be classified as mineral land, which letter appears in Book 56-D of the Serial Register of the District Land Office, Los Angeles, California, Serial No. 056831 [R. 240-241].

In addition to the fact that no issue was raised at the trial as to discovery, there was discovery by appellees in this case of clay in the area from which the trial court would certainly be justified in concluding that appellees had made discovery before filing Notice of Location, which is true in this case. The law does not intend that the locator of a mining claim shall determine the precise extent and character of the mineral or the continuity of the ore, and the existence of the rock in place bearing mineral, before he can make a valid location. (*Book v. Justice Company,* 58 Fed. 106; *Shoshone Company v. Rutter,* 87 Fed. 807; affirmed 177 U. S. 505.) Ricketts (American Mining Law, Sec. 591) has this to say about discovery:

> "The term 'discovery' has a technical meaning in mining. It may be defined as knowledge of the presence of the precious metals within the lines of the location *or in such proximity thereto as to justify a reasonable belief in their existence.* . . ."

In the case of *Cascaden v. Bartolis,* 162 Fed. 268 (affirming 146 Fed. 741), it was held that while a mere possibility that ground claimed is valuable for mineral, or that there are mere indications of the existence of mineral in the ground, is not sufficient to justify a prudent person in expending money and work in exploration of it; yet, where the evidence shows the actual existence of mineral in the claim, and such evidence is of sufficient weight to submit to the jury upon the issue of discovery, the locator has a right to strengthen his proof upon any of the elements which enter into what is comprehended by "discovery." In doing so, he may supplement the showing that mineral actually did exist by introducing evidence of the fact that as a ground of justification for the expenditure of time and money, the adjacent ground in the immediate vicinity is rich in the same mineral, or that adjacent claims were developed into paying mines after development upon similar showings of mineral, or *that the geological conditions are so similar to that from the character of the mineral discovered, it is reasonable to expect to find mineral in valuable quantities in the exploitation of the ground state.*

Ricketts (American Mining Law, Sec. 596) states:

> ". . . The courts never have held that in order to entitle one to locate a mining claim upon the public domain he shall show a paying mine at the time of location. . . ."

(*Cascaden v Bartolis, supra; Madison v. Octave Oil Co.,* 154 Cal. 768, 99 Pac. 176.) Ricketts quotes from *Book v. Justice Co., supra,* as follows:

> "Logically carried out it would prohibit a miner from making any valid location until he had fully demonstrated that the vein or lode or lode of quartz

> or other rock in place bearing gold or silver which he had discovered, would pay all of the expenses of removing, extracting, crushing and reducing the ore and leaving a profit to the owner. If this view should be sustained, it is manifest it would lead to absurd injurious and unjust results."

In any event, this action being by the rival location claimants, unless the issue of discovery is specifically raised at the trial, the appellants have no right to press this issue.

Even were the issue properly before the Court on this appeal, which we assert it is not, as we have theretofore pointed out, there was ample evidence to show that there was discovery of mineral before the locations were filed.

Point III of Appellants Hammond, et al.

Under this argument, appellants Hammond present two contentions, the first being that appellees failed to comply with the provisions of Section 2303a of the Public Resources Code of California, requiring the location of placer claims to be made by posting a Notice of Location upon a tree, rock in place, stone, post or monument. They say that plaintiffs cannot take advantage of the posts driven by appellees upon the lands on September 6, 1945, when the lands were not yet open to entry.

The complete answer to this contention may be found in Lindley on Mines, Vol. 2, Sec. 408, page 953, as follows:

> "A relocator may adopt stakes and monuments of a former location if they are still on the ground, in the absence of a statute specially authorizing it, provided the law in force in the state does not require new marking, as it does in some states."

California does not require new marking. The case of *Conway v. Hart*, 129 Cal. 480, 62 Pac. 44, 45, states:

> "The only contention of defendant on this point is, however, that the location of plaintiffs does not comply with the provision of the first sentence of said section 2324, to the effect that 'the location must be distinctly marked on the ground so that its boundaries can be readily traced'; and the objection made by the defendant in this matter is that the plaintiffs in making this location *did not put in new stakes to mark the boundaries, but referred to and used stakes which were standing on the ground, and which had been put in by them on a former occasion.* . . . This contention is not maintainable. These stakes so distinctly marked the location on the ground that its boundaries could be readily traced, and this was all that the statute requires. As the stakes referred to already stood at the proper places, it would have been a useless work to have taken them out and put them in again, or to have replaced them with other stakes. . . ."

But appellants say that the placing of the notices in a glass bottle (a seven or eight inch mason jar), which was buried (to a depth of four or five inches) in the ground, and which would have been visible above the ground at the foot of the posts [see photographs, appellees' Exhibit 43, R. 148], fails to give the publicity or information contemplated by the Code section. Placing such a notice in such fashion, below a post marking the ground and claim securely driven into the ground, is in accord with good mining practice, and is exactly what neither group of appellants did do. (*United States v. Sherman*, 1923, 8 Cir., 288 Fed. 497; *Alaska Consolidated Oil Fields v. Rains*, 1932, 9 Cir., 54 F. (2d) 868, 870-

871.) Ricketts states that the location notices should be posted at the discovery point *and it is customary to protect it from the elements in a box, tin can or cairn in plain view.* (Manner of Locating and Holding Mineral Claims in California, 1946, by A. H. Ricketts, with revisions as of July, 1946, by C. H. Logan.) And in Ricketts, American Mining Law, 1943, Sec. 695, it is likewise stated:

> "It is manifest that some precaution must be taken by a locator to protect his posted notice of location from destruction by the elements. This some locators seek to do, by covering such notice with glass, or folding it in a box and placing the box in a conspicuous place, or putting the notice upon a mound of rock, or putting the notice within a tin can."

To the same effect, see Lindley on Mines, Vol. 2, Sec. 356, page 821.

Surely, tacking the notice upon a stake and leaving it exposed to the elements in a windy desert (to which counsel for appellants Hammond called attention at the trial [R. 383]) as the Hammond group did, or just putting an incomplete notice (with no legal description, as permitted by Section 2303(b) Public Resources Code of California and no reference to some natural object or permanent monument, as prescribed by the same section, subdivision (a) thereof, the original being recorded and thereafter, with the legal description, being re-recorded [R. 308-309]) in a tin can some place on the claim with no post, monument or marker, as the Jose group did [R. 308-317], is not a compliance with the requirement that the claim be marked by post, and the same protected in some manner from the elements.

Appellants' next contention under Point III is that appellees did not comply with the provisions of Section 2305 of the Public Resources Code requiring performance of at least one dollar's worth of work for each acre included within the claims.

Mr. Lewis testified without any objection from any of the appellants that he, in behalf of appellees, had expended in excess of $160.00 for each claim, and had expended a total of $2,600.00 on all the claims. It will be observed that this did not include anything for Mr. Lewis' time and effort or expenses (see time book). The bankers corroborated the expenditure of $2,500.00 for labor, and the witness Wayne Hodgson, called to the stand by the appellants Jose, *et al.,* as their witness, testified that he witnessed other payments by Mr. Lewis by the Safeway Store and that he assisted therein [R. 369-370]. He also paid certain laborers funds supplied by Mr. Lewis [R. 206]. It would seem, therefore, that appellees did expend in excess of the sum of $160.00, as the uncontradicted and unobjected evidence of Mr. Lewis disclosed.

As to the argument of appellants Hammond, *et al.,* that appellees did not establish at the trial the manner of apportionment of the expenditures among the respective sixteen claims, and that therefore, they failed to meet the requirements of the section, it would be manifestly unfair for the appellants to raise that issue now in this Court for the first time, since they permitted appellees to prove their case at the trial, without objection, by direct questions to Mr. Lewis on the subject, when—if a seasonable objection had been interposed, appellees herein could have met it and have overcome it.

However that may be, there is ample evidence that the proper amount of work was done upon each claim, that

the reasonable value of the labor in performance thereof was paid—that it was done with pick and shovel in the accepted practice of good mining. The amount expended therefor, and the reasonable value thereof, was not objected to when testified to by Mr. Lewis. The record is ample to substantiate the amount which appellees claimed to have expended; and, as is stated in Lindley on Mines, Vol. 2, Sec. 635, page 1579:

> "Cost is an element in establishing value, and while not conclusive, strongly tends to establish the good faith of the claimant."

In the same section, it is also said (pp. 1579-1580):

> "In estimating the value of the labor performed the jury should consider the distance of the mine from the nearest point where labor could be procured, the cost of maintaining men while labor was being performed, the current rate of wages, and any other necessary and reasonable expense which might be incurred in the performance of the said labor."

Mr. William E. Wilson, a mining engineer, and a witness for the appellants, stated that the removal of dirt by hand labor in this area would run about $3.00 per yard [R. 345-346]. In some instances the clay was extremely hard and in other instances it was not [R. 138]. It follows logically that the harder the ground, the less one man could move in a day, which accounts for the fact that less yardage was removed from some claims than others. Notwithstanding this fact, over 1,436 cubic yards of material was removed by hand labor by appellees from the 16 claims, which—calculated at the value placed thereon by appellants' witness, Mr. William E. Wilson—means

that over $4,308.00 worth of material was removed by appellees from the 16 claims.

But, not only did Mr. Lewis testify that he expended over $160.00 per claim, he explained how he did so. They kept crews of 10 men each and would work them two 8-hour days on each claim, paying them $1.00 per hour. It is only a matter of calculation to find that the amount expended by appellees was a minimum of $160.00 per claim.

Point IV.

Under this proposition, appellants Hammond first argue that they fully complied with the provisions of the Public Resources Code of California pertaining to the posting of notices of location. On page 30 of their brief, in the fine print, appellants Hammond attempt to explain why the trial court erred in its opinion that the Amended Notices of Location were not true and correct copies of the cardboard notices (being Colorado forms), since the said Amended Notices contained the statement of the markings and statement of performance of the discovery work, which was not on the cardboard notices. They quote a part of Section 2313 of the Public Resources Code, omitting the part hereinafter referred to in italics, which says that "a true copy of the Notice of Location, together with a statement of the markings of the boundaries as required, *in this chapter,* and of the performance . . ." be recorded. Section 2303, which requires such markings, is in that chapter.

The so-called Amended Notices of Location were not at all duplicates of the Notices posted on the property, excepting only the addition of the discovery work done, as appellants Hammond would have this Court believe.

The card notices of location contained no "Statement of Markings and Boundaries" whatever. The Amended Notices contained such provision, under which this statement appears:

> "The markings of the boundaries of the aforesaid claim have been dispensed with since the claim has been located and described by legal subdivisions conforming to the United States General Land Office Survey of 1912."

The foregoing appears nowhere on the notice actually posted on the property, nor upon the duplicate recorded September 7, 1945. Can it be said that this Amended Notice is a "substantially true copy," as appellants contend?

We do not think that appellants Hammond, *et al.,* can present any case so romantic as to hold that such an amendment to the Notice of Location as was made in this case would be an inconsequential amendment. The cases to which they referred on page 31 of their brief are cases involving errors such as immaterial errors in the legal description, cured by references to monuments, etc. We are certain they can present no case going to the extent of holding that the purported Amended Notice of Location in this case contained an immaterial amendment.

The case of *Swanson v. Sears,* 224 U. S. 180, 181 (32 S. Ct. 455), relied upon by appellants Hammond, is authority against them, its effect being that after property has been properly located, etc., it is withdrawn from entry by others. This makes the claims of both Hammond's group and the Joses' group void, for the Houck group had already properly located the property, had previously discovered mineral thereon, and were in the con-

structive possession thereof. Ricketts (American Mining Law, Sec. 760) states:

> "In practice, discovery usually precedes location. The mining act treats it as the initial step, but *in the absence of an intervening right* it is no objection that the usual and statutory order is reversed. In such case, the location becomes effective from the date of discovery, *but in the presence of an intervening right it must remain of no effect.*"

Appellants knew of the claims of appellees before they proceeded to do their so-called discovery work and should not now be permitted to assert their claim to *prior discovery of mineral* by having been prior in doing *discovery work.* Their confusion in terms, and their failure to distinguish between the discovery of minerals and discovery work, pointed out earlier in this brief, is responsible for the contention now presented, that they made "discovery" first.

In any event, we again call attention to the language of *Chrisman v. Miller, supra,* in complete answer to appellants claim here—there being no issue of discovery in this case by way of pleading or evidence.

Point V.

Under this point, appellants urge the Court to reverse the judgment and instruct the trial court to enter judgment in their favor. To our way of thinking, the whole point is a sham argument, presented for the sole purpose of bolstering a weak and untenable position, and we intend to waste no time in answering it.

The Jose Brief.

A great deal that has been said is already in answer to the brief filed by the Jose group; for example, in their argument under Specification of Error No. 1, the Jose group states at least twice, that there was no evidence that appellees ever made any discovery until in December of 1945. We feel that we have completely answered this argument. On page 12 of the Jose brief, they argue that the Hammond group did not perform at least $1.00 worth of work for each acre included in the claim. With this argument, we are in accord.

At this point, we wish to again call attention to the case of *Swanson v. Sears, supra,* holding that after property has been properly located, it is withdrawn from entry by others. The Jose group were charged with knowledge in January, 1946, that on September 7, 1945, with claims properly posted and visible to the naked eye and discovery work upon the property also visible to the naked eye, that other parties were in possession of the property, and they are certainly in no position to assert the validity of their claims, even if they had been properly filed.

As to the manner of filing, we call attention to the testimony of William F. Lancaster, called by the Jose group, as follows:

> "Q. Now, directing your attention to a document that has reference to the Northeast Quarter of Section 20, Township 14 South, Range 12 East, was there a duplicate [315] document of that made? A. Yes, there was.
>
> Q. And on what date was that, Mr. Lancaster? A. That was made on January 17th.
>
> Q. And what was done with the duplicate document? A. *The duplicate document was placed into*

the ground in a can on the northeast Quarter of Section 20.

Q. And who placed it there? A. Let me see, Mr. John A. Jose. . . .

Q. Now, what was done with the documents that you have in your hand?

The Court: What is the date of that document?

Mr. Wood: *17th of January, 1946.*

The Witness: Well, this document—I filed this document with the County Recorder on the same day at 4:30 p. m. [316]

Q. Now, after you got it back from the County Recorder did you do anything further with the document? A. Yes. After we completed our location work on the property, I refiled this document with the County Recorder on April 12th, 1946.

Q. *Now, did you add anything to the document prior to the refiling of it?* A. *Yes. I myself filled in the statement on the back of it, marking the boundaries,* which read:

'The Southeast Quarter of Section 20, Township 14 South, Range 12 East. S.B.B. & M.'

And then in the statement of discovery work performed, I filled in the following:

'By performing at least $1.00 worth of work for each acre included in said claim, removing a minimum of 600 cubic yards of material to discovery of Montmorillonite on said claim, and sinking a shaft and open cut to a depth of at least ten feet from the lowest part of the rim at the surface.'

And then I signed my name as for the rest of the owners.

Q. And after you had done that you had it re-recorded? A. That is right, on April 12th, 1946." [R. 308-309.]

This is the method used by the appellants Jose throughout the rest of the entire claims [R. 313, 321]. Surely this does not comply with the law providing for the proper method of locating claims.

As to Specifications of Error, Nos. 2 and 3, the Jose group contends that appellees did not perform at least $1.00 worth of work per acre on each claim. This, we think, we have fully answered in our preceding discussion.

As to Specifications of Error, Nos. 4 and 5, we think the evidence does support the conclusion reached by the Court, but even if it does not, the errors charged are upon immaterial matters.

As to Specification of Error No. 6, we think we have fully discussed this in our brief.

Conclusion.

The appellees' group, in each instance, went upon the claim, posted a Notice of Location and placed a copy of the location in a Mason jar at the foot of a post which delineated the claim by legal description and gave the name thereof. Thereafter, appellees' group fully complied with Sections 2303 and 2304 of the Public Resources Code of California and with Sections 35 and 36 of Title 30, U. S. C. A., doing the necessary development work thereon, preparing certificate to that effect, and causing a duplicate of the claim that had been placed upon each parcel of land as aforesaid, with a statement of the development work performed, to be recorded with the County Recorder of the county where the land is located.

As to the posting, the boundaries were clearly marked and the duplicate copies of the Location Notice placed in jars near the post where they could not be destroyed by the elements. In each instance the posting of the Notices

was witnessed by two witnesses, each of whom indicated to the minute the time of the posting.

As to the Hammond group, they came upon the property with Colorado forms of claims, not containing a statement of the markings and boundaries of the property, tacked upon stakes which they drove into the ground or erected monuments around the base thereof to hold them in place. They did not place duplicate copies of the claim in any tin can or jar or take any means or any step whatever to protect the same from the elements or to keep them from being blown away.

As to the Jose group, they did not place any posts upon the land at all, or stakes of any kind, but simply placed duplicate copies of their claim to each section in tin cans which were buried on the property. They did not mark the cans with stakes or posts or monuments of any kind.

The Hammond group caused their Colorado claims, duplicates of the ones posted upon the various claims, to be recorded at 10:00 a. m. on September 7, 1945. Said claims did not contain any statement of the development work done, (as they could not have on that occasion, the hour of 10:00 a. m., September 7, 1945, being the first minute at which the property could have been claimed by locators upon the land).

As to the development work, appellees herein excavated more than 7 cubic yards of dirt from each claim and expended more than $1.00 per acre in so doing. Proof of this fact was established by the testimony of H. W. Lewis who testified in each instance as to each claim that he had expended more than $160.00 for each claim and his testimony in that regard was corroborated by the time book of employees, which was kept, and by the

representatives from the bank who witnessed the payments, and by the testimony of Mr. Lewis as to the manner of performing said labor.

What appellants Hammond did on the property at the time of location is already set out in this brief. But attention should also be directed to the fact that the sense of precaution of the Hammond group did not extend to the procurement of proper California forms, and said Colorado forms bore no evidence of ever having been signed when examined through a magnifying glass, although the typing thereon was not entirely deleted, even though weatherbeaten [R. 254]. They recorded copies of the Location Notices at 10:00 a. m. on September 7, 1945, to-wit, the same day the originals were placed on the land, but all, with the exception of Platte No. 3, to-wit, the Southeast Quarter (SE¼) of Section 21, were recorded prior to the time that they were posted. Ricketts (American Mining Law, Sec. 698) states: "*In the absence of any intervening right* the recording of a Notice of Location before it is posted upon the ground will not vitiate the location." (See *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182; *Con. Mutual Oil Co. v. United States*, 245 Fed. 524.)

Here, there were intervening rights.

The originals of these location notices were never re-recorded, nor were they introduced at the trial as the proper notice of location, counsel for the Hammond group emphasizing the purpose of their introduction, as follows:

> "Mr. Painter: I just got through saying, your Honor, *I was not asking them to be introduced in evidence for the purpose of showing that we complied with any statute, other than that we have in*

evidence a duplicate of that which was posted on the property for which we have the oral testimony of the witnesses." [R. 349.]

They then relied upon Amended Notices of Location, which were recorded November 24, 1945, to-wit, after all rights of appellees herein had accrued [R. 352-355].

Appellants Hammond, *et al.*, presented no evidence whatever of discovery of mineral *before* location, as did the appellees [R. 143]. As we have heretofore set out, appellees were on the property in 1942, took samples and had the same analyzed and found it to contain Montmorillonite clay. No objection whatever to the statement of Mr. Lewis that he had it analyzed and was told it was Montmorillonite, was interposed by either of appellants at the trial [R. 143].

There is not a word in the transcript that indicates the discovery of *Montmorillonite* clay by appellants. They refer in their brief to the uncovering of "clay," referring to pages 338, 340 and 341 of the record, to substantiate their claim to the first discovery of "mineral." We realize that clay is a mineral, but the value in this property is that it is a valuable type of mineral, to-wit, Montmorillonite. So far as the record discloses, appellants never discovered the true value thereof.

We submit that the judgment reached by the trial court in this matter is a just and logical conclusion from the evidence presented; that complete and entire justice in the matter has been done and that the judgment should be affirmed in its entirety.

Respectfully submitted,

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Attorneys for Appellees.